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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 317

ESTATE OF JOSEPH F. DE CASTRO, DECEASED, KINGS COUNTY TRUST COMPANY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 21–26) are not reported. The opinion of the Circuit Court of Appeals (R. 36–41) is reported at 155 F. 2d 254.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 22, 1946. (R. 42.) The petition for a writ of certiorari was filed on July 19, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether charitable bequests in remainder of the corpus of testamentary trusts are deductible for estate tax purposes, when the trustee is empowered, in its sole discretion, to invade the corpus "to amply provide" for the needs of the life tenent in the event of illness, accident or unforeseen emergency.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 812. NET ESTATE.
>
> For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> * * * * *
>
> (d) *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the

activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. * * *

(26 U. S. C. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.44. *Transfers for public, charitable, religious, etc., uses.* * * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *

* * * * *

SEC. 81.46. *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is

vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power. [Italics supplied.]

STATEMENT

The Tax Court found the following facts (R. 21–23):

The petitioner is the executor of the estate of Joseph F. deCastro, who died on November 2, 1941. (R. 21.)

In his will the testator provided for a division of his residuary estate into two equal parts, one of which, referred to as Trust A, was to be held in trust for the benefit of his wife, Fannie deCastro, for life and after her death for the benefit of her nephew, Louis J. Murphy, for life. Upon the death of the survivor of them the trust was to terminate and 90 percent of the then remaining principal was to be paid to certain named

charitable, educational and religious organizations. The remaining 10 percent was to go to a named individual, if living at that time, or, if not, the whole remainder was to go to the charities named. (R. 21–22.)

The other one-half of the residuary estate, referred to as Trust B, was to be held in trust for the benefit of the wife for life and after her death for the benefit of her niece, Irene Murphy, for life. That trust was to terminate upon the death of the survivor of them and the remaining principal was to be paid to certain named charities. (R. 22.)

Article Third of the will contained the following provision for the invasion of the corpora of the trusts (R. 22):

> Notwithstanding any of the provisions hereinbefore made, if, during the life of my wife, Fannie DeCastro, due to her illness, accident or other unforeseen emergency, the income of the two (2) trusts shall not be sufficient to amply provide for her needs, then and in that event I authorize and absolutely direct my Trustee to apply from the principal of the two (2) trusts, in equal proportions, such sum or sums as, in the sole discretion of my Trustee, will amply provide for her needs. I especially direct that no one shall have the right to call in question the propriety or the amount so applied for my wife. Upon the death of my wife I direct that my Trustee

shall pay her funeral expenses and charge them against the two trusts, in equal proportions.

At the date of testator's death his wife was 75 years of age, Louis J. Murphy, her nephew, was 41 years of age, and Irene Murphy, her niece, was 45 years of age. (R. 23.)

The net income of the trusts for the years 1942, 1943 and 1944 was as follows (R. 23):

Year	Trust A	Trust B
1942	$2,208.89	$2,206.40
1943	2,367.33	2,390.40
1944	2,322.28	2,378.32
	6,899.10	6,975.12

Since decedent's death his wife has lived within the income distributed to her by the trustee and has accumulated about $600 of such income. With a cash bequest of $2,500, which she received under decedent's will, she had on hand in February, 1945, about $1,250 in United States bonds, $1,000 in a savings bank, and about the same amount in a checking account. There was also approximately $1,700 of undistributed income in the trusts. She has no other property or income of any substantial amount. (R. 23.)

The combined assets of the trusts had a value of $83,166.74 at the time of decedent's death and a value of $117,354.81 at March 1, 1945. The trust investments consisted principally of mortgages, stocks and bonds. (R. 23.)

Since decedent's death his wife has lived at a hotel where she pays $120 per month for her

room. Her meals cost about $3 a day. She dresses moderately and goes out very little. (R. 23.)

A deduction was claimed in the estate tax return of $31,960 on account of the bequests to charity. The Commissioner disallowed the deduction. (R. 23.)

The Tax Court upheld the Commissioner's determination on the ground that the decision of this Court in the case of *Merchants Bank* v. *Commissioner*, 320 U. S. 256, was determinative. (R. 23–24.) The Court below affirmed the Tax Court's decision. (R. 41.)

ARGUMENT

The court below correctly held that this case is controlled by *Merchants Bank* v. *Commissioner*, 320 U. S. 256, wherein the trustee was authorized to invade the corpus for the "comfort, support, maintenance, and/or happiness" (p. 258) of the testator's widow. This Court there expressly approved the Treasury Regulations[1] which provide that where a trust is created for both charitable and private purposes the charitable bequest, to be deductible, must have, at the testator's death, a value "presently ascertainable, and hence severable from the interest in favor of the private use;" and further, to the extent that there is a power in

[1] Articles 44 and 47 of Treasury Regulations 80 (1934 ed.) were there involved and were substantially the same as Treasury Regulations 105 which are here applicable.

a private donee or trustee to divert the property from the charity "deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

In the present case, the trustee was empowered to invade the trust corpus for such sums as in the trustee's sole discretion would amply provide for the widow's needs if "due to her illness, accident or other unforeseen emergency, the income of the two (2) trusts shall not be sufficient to amply provide for her needs." (R. 22.)

This Court denied the petition for a writ of certiorari in *Industrial Trust Co.* v. *Commissioner,* 151 F. 2d 592 (C. C. A. 1st), on March 11, 1946, No. 781, 1945 Term, which presented the same contentions as are here made.[2] There, as here, the petitioners asserted a conflict with *Commissioner* v. *Robertson's Estate,* 141 F. 2d 855 (C. C. A. 4th), and *Commissioner* v. *Wells Fargo B. & U. Tr. Co.,* 145 F. 2d 130 (C. C. A. 9th). The Fourth and Ninth Circuit Courts of Appeals failed to give effect to the Treasury Regulations and proceeded upon the premise that the issue

[2] In the *Industrial Trust case* (No. 781, October Term, 1945, R. 15), the trustees in their "uncontrolled ' * * discretion" were authorized to pay to the testator's wife so much of the principal as they may deem to be required for any purpose approved by them where the income "shall be insufficient to provide for her comfortable maintenance and support, or to meet the expense of any sickness, emergency or misfortune, or any other expense whether of a like or different kind, deemed by said Trustees to be proper for her comfort or pleasure * * *."

turned not upon the *character* of the power of invasion, but upon the *likelihood* of its exercise.[3] That approach was squarely in conflict with the *Merchants Bank* decision and, as recognized in the Government's brief in opposition in the *Industrial Trust* case (p. 7), those decisions are, to that extent, in conflict with the *Industrial Trust* decision as well as with the decision below. However, since the Tax Court and the court below were so clearly correct in holding that the *Merchant Bank* decision controls this case, there is no warrant for further review by this Court and we oppose the granting of this petition. The petition should be denied here, as it was in the *Industrial Trust* case.

Respectfully submitted.

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AUGUST 1946.

[3] It is also true that the Tax Court has recently stated that deductibility of such bequests "depends, generally, upon the language of the power and the likelihood of its exercise as disclosed by the facts and circumstances of each case." *Estate of Jack* v. *Commissioner*, 6 T. C. 241, 244; *Estate of Elmer* v. *Commissioner*, 6 T. C. No. 121.

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